

NO. 83-944

Office - Supreme Court, U.S.

FILED

In the
Supreme Court of the United States

JAN 5 1984

ALEXANDER L. STEVENS,
CLERK

OCTOBER TERM, 1983

REUBEN MICHAEL PIERI

Petitioner

VERSUS

SOUTH CENTRAL BELL TELEPHONE COMPANY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

RAYMOND J. SALASSI, JR.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 581-6641

ATTORNEYS FOR RESPONDENT

PARTIES TO THE PROCEEDING

1. Reuben Michael Pieri, petitioner.
2. South Central Bell Telephone Company, respondent.

TABLE OF CONTENTS

	PAGE
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Statement of Facts	3
SUMMARY OF ARGUMENT	8
ARGUMENT	9
CONCLUSION	11
CERTIFICATE OF SERVICE	13
APPENDIX A	A-1

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Arellano v. Henley</i> , 357 So.2d 846 (La. App. 4th Cir. 1978)	11
<i>Boeing Co. v. Shipman</i> , 411 F.2d 365 (5th Cir. 1969)	9
<i>Crump v. Crump</i> , 393 So.2d 337 (La. App. 1st. Cir. 1980)	10
<i>Desselle v. Guillory</i> , 407 So.2d 79 (La. App. 3d Cir. 1981)	11
<i>Hyatt v. Lindner</i> , 133 La. 614, 63 So. 241 (La. 1913)	10
<i>Madison v. Bolton</i> , 234 La. 997, 102 So.2d 433 (1958)	11
<i>Roche v. Aetna Casulaty & Surety Co.</i> , 303 So.2d 888 (La. App. 1st Cir. 1974), writs refused, 307 So.2d 372 (1975)	11
<i>Strong v. American Ry. Express Co.</i> , 163 La. 180, 111 So. 669 (La. 1927)	11
<i>Toomer v. Breaux</i> , 146 So.2d 723 (La. App. 3d Cir. 1962)	11
<i>Ward v. Sears, Roebuck & Co.</i> , 339 So.2d 1255 (La. App. 1st Cir. 1976)	11

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

REUBEN MICHAEL PIERI

Petitioner

VERSUS

SOUTH CENTRAL BELL TELEPHONE COMPANY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The material facts and the course of proceedings below are accurately set forth in the opinion of The United States Court of Appeals for the Fifth Circuit, which is attached to the Petition for a Writ of Certiorari as Exhibit A-3 — A-9.

Reuben Michael Pieri originally filed a Petition for a Preliminary and Permanent Injunction and Temporary Restraining Order in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, seeking to enjoin and restrain South Central Bell Telephone

Company (hereinafter "South Central Bell") from changing, altering or tampering with the pedestals or telephone equipment used to furnish service to telephone number (504) 394-9608 in order to allow plaintiff sufficient time to inspect and test the said equipment and cables in connection with his attempted defense of criminal charges then pending against him in the Twenty-Fourth Judicial District Court, Parish of Jefferson. Plaintiff had been charged with the placing of certain obscene, harassing, or annoying telephone calls from that telephone number. By agreement of counsel, a temporary restraining order was entered allowing said inspection, which inspection was conducted and concluded by plaintiff and certain experts retained by him. Subsequent thereto, petitioner amended his Petition to seek damages in the total amount of \$503,500.00 against South Central Bell, allegedly as a result of South Central Bell's having willfully, intentionally or negligently caused the false arrest, criminal accusation and subsequent incarceration of petitioner in connection with the alleged offending telephone calls.

The suit was removed by defendant to the United States District Court, Eastern District of Louisiana. South Central Bell filed an Answer alleging that the complaint by plaintiff failed to state a claim against defendant upon which relief could be granted, denying that it or anyone for whom it was responsible filed any criminal charges or complaint against the plaintiff or caused same to be filed and, finally, denying that the procedures used by it in identifying the source of alleged annoying, harassing and obscene telephone calls were inadequate in any way or that they were applied in a negligent fashion in connection with the particular procedures used that ultimately identified '504) 394-9608 as the source of the offending telephone calls. A Motion for Summary Judgment was brought by South

Central Bell and denied by the court.

A trial was held on February 8, 9 and 10, 1982, and a jury verdict in the amount of \$47,500.00 was rendered in favor of the plaintiff and judgment entered thereon. At the conclusion of plaintiff's case in chief and again at the end of defendant's case, defendant moved for a directed verdict, which was denied.

Defendant filed a Motion for Judgment Notwithstanding the Verdict, or, Alternatively, Motion for New Trial, which was heard and denied by the court.

South Central Bell Telephone filed a Notice of Appeal from the final judgment entered on March 16, 1982, and from the order entered April 16, 1982, denying defendant's Motion for Judgment Notwithstanding the Verdict, or, Alternatively, Motion for New Trial. The United States Court of Appeals, for the Fifth Circuit, reversed the District Court's denial of South Central Bell Telephone Company's Motion for Judgment Notwithstanding the Verdict. A Petition for Rehearing was filed by Mr. Pieri and denied by the Appellate Court.

Statement of Facts

The facts established at trial are relatively simple and, in many respects, undisputed. On January 11, 1979, subscribers of South Central Bell, Mr. and Mrs. Thomas T. Turner, complained to the Annoyance Call Bureau of the telephone company that they were receiving obscene and harassing telephone calls. South Central Bell is a public utility and is regulated by the Louisiana Public Service Commission. All of its operations in furnishing services to its subscribers are governed by the General Subscriber

Services Tariff on file with the Commission and, further, South Central Bell is subject to regulation by the Commission. In accordance with its tariff provisions dealing with the use by subscribers of the telephone to interfere with the service of others or to annoy others, (A. 2.2.10), and specifically pursuant to a General Order issued by the commission on May 17, 1956, (Appendix A) defendant instituted its normal procedures in response to such complaints. It advised the subscribers that before any further action could be taken a formal complaint had to be filed with the Jefferson Parish Sheriff's Office. The subscribers did so. After having filed such a Complaint, and upon the written authorization of the Turners', beginning on January 12, 1979, South Central Bell used certain switching equipment to trap telephone calls coming to that number.

The line identification procedure involved the use of certain switching equipment in which a switching equipment technician utilized the number grouping equipment, trouble recording equipment and a translator in the number trapping operation, which equipment is that normally used by the telephone company, and its switching equipment technicians, to detect trouble and service problems on a customer's line. The installation of the equipment on the incoming line of the complaining subscribers resulted in all incoming calls to that telephone number activating receiving equipment in the Central Office to make and eject a "trouble card", which is a computer card which records the date, time and line location of the source of the incoming call. Each line location is identified with only one active telephone number.

These procedures have been developed by South Central Bell in response to the order of the Louisiana Public

Service Commission and in order to enable it to respond to the thousands of complaints of obscene, harassing or annoying telephone calls received annually by South Central Bell from its Louisiana subscribers. Evidence produced at trial established that South Central Bell handled in excess of 30,000 complaints each year from subscribers for obscene, harassing and threatening telephone calls for the years 1978-1981.

The Turners were instructed that whenever an annoying or obscene telephone call was received they were to call a given telephone number at the Central Office which would be answered by the technician who was monitoring the trap equipment. Between January 12 and January 15, 1979, the trapping equipment kicked out numerous "trouble tickets" indicating calls to the Turners' telephone number and immediately thereafter the Turners called and identified them as annoying or obscene telephone calls. Using line identification equipment, the technician was able to identify the telephone number assigned to the telephone cables from which the telephone calls were being made. On January 19, 1979, the information developed by the trapping equipment, which identified only the date, time and identity of the location of the calling equipment was delivered to the Jefferson Parish Sheriff's Department pursuant to its request. Approximately two months later, on March 5, 1979, Mr. Pieri was arrested by Detective Dedo Frank Hardin, Sr. of the Sheriff's Department and charged with making obscene or harassing telephone calls. The decision to arrest plaintiff was reached by Detective Hardin, a 20-year expert in handling these types of cases, after further investigation and discussion with the Turners. In fact, the arrest apparently occurred only after the Turners wrote a rather emotional letter to then Sheriff Alwynn J. Cronovich summarizing the gravity of the situation, chronicaling

the history of their attempts to get relief from the calls and complaining of no action from his office.

South Central Bell did not recommend prosecution of plaintiff, did not ask that he be prosecuted, did not swear out a warrant or complaint against the plaintiff, did not participate in his arrest, was not present at his arrest, had no power or control over the investigating officer and had no knowledge of the arrest of plaintiff and his arraignment until after the fact, when subpoenaed to appear in Court to give testimony.

It is significant to remember that South Central Bell did not attempt to identify the name, age, sex, race or any other identifying qualities of the person making the calls and the procedures used by them did not result in South Central Bell personnel actually listening to the conversations complained of. All of this information was developed by the Jefferson Parish Sheriff's Department on the basis of information resulting from their investigation and information furnished them by the complaining subscribers, Mr. and Mrs. Turner. In fact, while Sheriff Hardin chose to arrest an adult male, Mr. and Mrs. Turner, in testimony and in their original complaint to South Central Bell, stated that it was their belief that the calls were being made by two different people, one a female and the other a very young male—neither of them identified an adult male as the offending caller.

The South Central Bell personnel who were involved in the trapping procedures and who supervised the office in which they were done, each gave uncontroverted testimony which established the reasonable procedures which were used for trapping and identifying such calls, and which clearly established that the procedures were followed in

this particular case. Furthermore, the information developed by the craftsmen during the actual trapping was verified by their supervisor, who testified that the verification he did totally eliminated the possibility of occurrence of the other actions or activities which plaintiff suggested *might* have caused South Central Bell to identify the calls as having come from the wrong location.

Furthermore, after the incident complained of, and in the company of an expert designated by plaintiff, both Central Office and outside plant personnel thoroughly and completely inspected all of the telephone equipment, cables and services which served Mr. Pieri's house, from the Central Office location through his house, and positively established that there were no foreign facilities which were used on, or could have been used on, plaintiff's telephone line which might have accounted for some other party outside of plaintiff's residence having made the calls in question. In other words, not only did South Central Bell clearly establish through testimony that its procedures were adequate but the physical inspection verified that there could have been no other source for the calls identified by South Central Bell. Furthermore, all of the experts presented by plaintiff and defendant confirmed that there would have been physical evidence on the cables serving plaintiff of any of the other possible explanations for the source of the offending calls and this joint inspection failed to reveal any such tampering.

On the other hand, plaintiff, who clearly bore the burden of proof in this case, testified and spent a tremendous amount of time attempting to prove that *he* did not make the telephone calls in question. His testimony, and that of his other fact witnesses, clearly established that it was possible that the telephone calls could have been made

from the telephone in his house by others, either family members, visitors to his house, or intruders. Plaintiff attempted to turn this case into a defense of a criminal charge of placing obscene telephone calls, rather than undertaking the burden of proving in a civil action for money damages exactly what it is that South Central Bell did or failed to do negligently in this case. Furthermore, plaintiff, his experts and his counsel admitted in testimony and in argument to the Court that they were unable to identify or specify what it was that South Central Bell allegedly did negligently or what caused his telephone number to be identified as the source of the telephone calls involved. In other words, plaintiff and his experts suggested possibilities to the jury but did not clearly establish anything that actually occurred or existed which proved the information furnished by South Central Bell to be inaccurate.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because the considerations governing review on certiorari indicate that there are no special and important reasons for the issuance of a Writ in this case. In particular, the decision below is not inconsistent with any decision of this Court or any other federal Court of Appeals on the same matter, nor is it in conflict with any decision of the Louisiana Supreme Court or any appellate courts of that state. Moreover, the lower Court has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In addition, the Petition for a Writ of Certiorari should be denied because the decision of the Court below was correct and consistent with prior decisions of this

Court and prior decisions of other courts of appeal, both federal and Louisiana state.

Finally, South Central Bell takes no position on Mr. Pieri's plea for publication of the Appellate Court's decision, but respectfully suggests that questions such as that do not warrant the exercise of this Court's power of supervision.

ARGUMENT

As is obvious from a reading of the opinion of the United States Court of Appeals for the Fifth Circuit, attached as an appendix to the Petition for a Writ of Certiorari, that Court was perfectly aware of the standards under which it was obligated to review the judgment entered as a result of the jury verdict in favor of plaintiff in the district court. As can be seen by reference to the beginning of the analysis portion of the opinion, the Court expressed that it was being guided by the standard set out in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) in reviewing the denial of a Motion for Judgment Notwithstanding the Verdict. The Court's statement of the standard is consistent with rulings of that Court and all federal courts.

Furthermore, the Court's opinion likewise exhibited a complete understanding of the Louisiana theory in negligence cases which is the familiar duty/risk theory.

In reviewing the evidence "in the light most favorable to..." Mr. Pieri, the Court correctly concluded that Mr. Pieri "never presented any evidence of any act or omission committed by Bell which could have resulted in the misidentification of his telephone line." (Appendix A-8

to Petition for Writ). In reviewing the evidence, the Court found that Mr. Pieri had not presented the necessary substantial evidence which was necessary for the case to have been allowed to go to the jury.

In sum, the Petition for a Writ of Certiorari presents nothing unique or of special importance to this Court. Mr. Pieri simply is attempting to have one final review of the facts and evidence produced at the trial herein, which simply is not a sufficient basis upon which this Court should base the exercise of its supervisory powers.

Not only was the Appellate Court's decision correct in its reversal of the district court's failure to grant a Judgment Notwithstanding Verdict, but, in addition, the reversal of the jury verdict can be substantiated on other, well recognized, bases. First, since the sole basis for Mr. Pieri's complaint against the telephone company was the communication by it to the Jefferson Parish Sheriff's office of information developed about the complained of telephone calls, Mr. Pieri's claim is basically one for defamation. However, the Louisiana jurisprudence long ago established that such a cause of action requires a communication of defamatory words to a third party which is false and made with malice (either actual or implied) and which leads to an injury. Defamation requires that the communication refer to some ascertained or ascertainable person. The Louisiana Supreme Court case of *Hyatt v. Lindner*, 133 La. 614, 63 So. 241 (La. 1913) clearly held that communications such as existing in the instant case were not defamatory because they had not been made concerning any specific individual and, in addition, for reason that the defendant had probable cause to make the report. Secondly, the furnishing of information such as is involved in the instant case and which arises out of a requirement of the Louisiana

Public Service Commission that telephone companies cooperate with police authorities in dealing with these types of calls, enjoys what is referred to as a conditional privilege. Entities such as the telephone company are not liable in damages for having furnished information reasonably generated by it to law enforcement authorities. *Strong v. American Ry. Express Co.*, 163 La. 180, 111 So. 669 (La. 1927); *Crump v. Crump*, 393 So.2d 337 (La. App. 1st Cir. 1980); *Roche v. Aetna Casualty & Surety Co.*, 303 So.2d 888, 890 (La. App. 1st Cir. 1974), *writs refused*, 307 So.2d 372 (1975); and *Toomer v. Breaux*, 146 So.2d 723 (La. App. 3d Cir. 1962). See also, *Madison v. Bolton*, 234 La. 997, 102 So.2d 433 (1958); *Desselle v. Guillory*, 407 So.2d 79 (La. App. 3d Cir. 1981); *Arellano v. Henley*, 357 So.2d 846 (La. App. 4th Cir. 1978); and *Ward v. Sears, Roebuck & Co.*, 339 So.2d 1255 (La. App. 1st Cir. 1976).

Finally, Mr. Pieri seeks redress from this court because of the decision by the United States Court of Appeals for the Fifth Circuit not to publish its decision. Respondent does not take a position as to that complaint by Mr. Pieri other than to suggest that it would be delighted with the publication of the opinion. Nevertheless, it is respectfully submitted that the question of the publication or not of an opinion of the Appellate Court does not raise a question which is special and important and which require the exercise of this Court's supervisory jurisdiction.

CONCLUSION

Petitioner has failed to show that there are special and important reasons existing in this case which would warrant a review of the decision below on a Writ of Certiorari. More particularly, the decision by the Appellate

Court does not conflict with prior decisions of this Court, nor does it conflict with the decisions of other federal Courts of Appeal on the same matter, nor with any appellate courts of the State of Louisiana; and the Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Therefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RAYMOND J. SALASSI, JR.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street, 18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641

Attorneys for Respondent,
South Central Bell Telephone Company

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 1984, three copies of the foregoing brief were served on counsel for petitioner, Nathan Greenberg, Esquire, Greenberg & Dallam, by depositing same in the United States mail addressed to him at 848 Second Street, P.O. Box 365, Gretna, Louisiana 70054.

RAYMOND J. SALASSI, JR.

APPENDIX "A"

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

Applicable to Telephone Companies
subject to the jurisdiction of this
Commission.

At a session of the Louisiana Public Service Commission held at Baton Rouge, Louisiana, on May 11, 1956, the matter of complaints with respect to the lack of cooperation by certain Telephone Companies in apprehending psychopaths who call persons on the telephone and insult them, using profane and obscene language was considered. The Commission concluded that the matter is one of a very serious nature requiring some definite action.

In a recent case of this kind, a Sheriff has reported that his deputies held an offending party on the telephone for one hour. During that hour, the Telephone Company representatives were requested to assist and no effort on the part of that company was made to apprehend the party or to identify the station from which the call was being made.

While the Commission is mindful of the prohibition against wire tapping, it nevertheless feels that it is unnecessary to violate this prohibition while cooperating with law enforcement officers in their attempts to apprehend the type of offender above mentioned.

It is accordingly ordered that all telephone companies coming under the jurisdiction of this Commission shall take all possible steps to cooperate in attempts to apprehend persons making telephone calls for the sole purpose of insulting and harassing telephone subscribers with obscene, profane or abusive language, when such cooperation is requested by law enforcement officers.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
MAY 17, 1956

(SIGNED) WADE O. MARTIN
CHAIRMAN

(SIGNED) NAT. B. KNIGHT
COMMISSIONER

(SIGNED) JOHN J. MCKEITHEN
COMMISSIONER

SECRETARY